IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4245 of 2001
With
SPECIAL CIVIL APPLICATION No. 4307 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HARENDRABHAI VITHALBHAI JOSHI - Petitioner(s)
Versus
SATYAGRAH CHHAVNI CO. OP. HSG. SOCITY LTD. - Respondent(s)

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Appearance :
MR AK CLERK for Petitioner(s) : 1,
MR SK JHAVERI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 28/06/2007

COMMON JUDGMENT

1 Rule. Mr.S.K. Jhaveri, learned Advocate appearing on behalf of the respondent in both the petitions appears and waives service. With consent of the parties the matters are taken up for final hearing and disposal today.

2 Both these petitions are taken up for hearing together as they arise out of common judgment and order made by Gujarat State Co-operative Tribunal in Review Application Nos. 14 of 1999 and 15 of 1999 decided on 18.04.2007 as well as order dated 29.10.1999 and 04.11.1999 in Appeal Nos. 441 of 1995 and 349 of 1995 respectively. The facts as recorded in order made in Appeal No. 441 of 1995 are taken into consideration. The petitioners in both the petitions are members of the respondent housing society. The petitioners challenged resolution dated 18.09.1994 passed by respondent-society whereunder the maintenance charges levied by the respondent society were to be charged at the rate per square yard from the members of the society in relation to the plot held by the member concerned. The said resolution came to be quashed by the Board of Nominees vide judgement and order dated 22.02.1995.

3 The respondent – society challenged the same before the

Tribunal accompanied by application for condonation of delay as well as application for staying the operation of the judgment and order made by the Board of Nominees. It appears that the Tribunal stayed the operation of the order made by the Board of Nominees without recording any finding as to condonation of delay.

4 The petitioners, therefore, approached this Court by way of Special Civil Application No. 198 of 1996 which came to be decided on 15.03.1996 by issuing following directions:

> *"3. Considering the facts of the case, the Tribunal is directed to take up necessary proceedings for registration of appeal including notice and hearing of the application for condonation of delay of appeal. If the petitioner – (respondent in the Appeal) appears before the Court and contests the application for condonation of delay, the same shall be decided within a period of two weeks from the date of appearance. Till the application for condonation of delay is decided and in case the same is condoned and appeal is registered and arguments are heard on interim relief, the interim order of this Court dated 10.1.96 shall remain in force".*

5 Thereafter, the appeal came to be decided vide impugned order dated 29.10.1999 whereunder the Tribunal accepted the appeal and remanded the matter to the Board of

Nominees after quashing and setting aside the judgment and order made by the Board of Nominees on 22.02.1995.

6 The petitioners preferred Review Application before the Tribunal making grievance that the directions made by this Court vide order dated 15.03.1996 had not been complied with by the Tribunal and furthermore the Tribunal had incorrectly recorded that the learned Advocate for the petitioners had conceded before the Tribunal on the issue of condonation of delay. However, the Tribunal did not accept the Review Application and rejected the same vide judgment and order dated 18.04.2001.

7 Mr.A.K.Clerk, learned Advocate appearing on behalf of the petitioners in both the petitions reiterated the aforestated factual backdrop and submitted that the Tribunal had committed an error in law in not deciding the application for condonation of delay first in point of time before rendering any decision on merits of the dispute between the parties. Therefore, according to the learned Advocate for the petitioners, the impugned orders made by the Tribunal deserve to be quashed and set aside.

8 Mr.S.K.Jhaveri, learned Advocate appearing on behalf of

the respondent-society submitted that it was incorrect to state that delay had not been condoned by the Tribunal and for this purpose the learned Advocate invited attention to paragraph No.2 of order dated 29.10.1999 made by the Tribunal. According to the learned Advocate the Tribunal had come to the conclusion that, in fact there was no delay and hence proceeded to hear the appeals on merits. It was further submitted that the Tribunal having found that respondent society had not been granted an opportunity of hearing by the Board of Nominees and the learned Advocate of the petitioners (respondents before the Tribunal) having agreed to have the matters remanded there was no error in the impugned orders of the Tribunal which would require intervention at the hands of this Court. Further submission was made to the effect that an order in review proceedings was not amenable to challenge in a writ petition under Article 226 of the Constitution, and hence, it was not open to this Court to entertain the petitions.

9 The law is well settled. A Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution would not interfere in an order made by the Tribunal, if the order is rendered after taking into consideration all the facts

and relevant circumstances of the case, merely because in the same set of facts and circumstances a different view is possible. Similarly the High Court would not undertake reappreciation of the evidence on record in exercise of extraordinary jurisdiction. However, where there is an apparent error in law or the impugned order of the subordinate Forum suffers from perversity, it is permissible for the High Court to intervene.

10 Applying the aforesaid principles to the facts of the case it becomes apparent that while passing the impugned order dated 29.10.1999 the Tribunal has singularly failed to apply its mind to the powers vested in the Tribunal and the duty assigned to the Tribunal in exercise of those powers. Despite directions having been made by this Court the Tribunal has failed to record any categorical finding on the plea raised on behalf of the petitioners-respondents before the Tribunal, that the appeals are barred by limitation. The so called observations made in paragraph No.2 of order dated 29.10.1999 cannot be termed to be findings of the Tribunal. After recording the fact that appeal has been filed on 30.12.1995 after obtaining certified copy of the order on 29.12.1995, the immediate next sentence records that the appeal is within the period of

limitation in the circumstances and that there is no objection as regards this by the other side. The following sentence records that affidavit of Shri Kirit Brahmbhatt on behalf of the society has been proved. Subsequent sentence which follows states that in the aforesaid circumstances, it has been decided that the appeal is within the period of limitation. The words used in Gujarati are significant : the words do not state that the Tribunal records finding that the appeal is within the period of limitation : the words record that it has been decided. When one reads the aforesaid sentence in conjunction with other preceding sentences it becomes apparent that the Tribunal has recorded submissions made on behalf of the appellant society before the Tribunal without recording any finding on its own.

11 However, even if one proceeds on the footing that the delay stands condoned and Tribunal has proceeded to decide the appeal on merits the subsequent part of the order does not reflect any reasons being recorded by the Tribunal for the final conclusion drawn by the Tribunal. Paragraph No.3 of the impugned order records the submissions made on behalf of the appellant-society, while paragraph No.4 records one sentence on behalf of the respondents viz. petitioners herein. The said sentence records that the Advocate of the other side

states that as the suit is yet live if this proceeding is restored for hearing the Advocate would have no objection. The learned Advocate for the respondent-society submitted that as the learned Advocate for the petitioners had submitted before the Tribunal that there would be no objection if an order of remand is made the Tribunal was not required to record any further findings. This submission would have been acceptable provided this was the only submission made by the learned Advocate for the opponents before the Tribunal. However, when one reads the earlier part of the same sentence it becomes apparent that there is total non application of mind and incorrect recording of fact by the Tribunal. It is an admitted position between the parties that the Board of Nominees had finally disposed of the suit when Board of Nominees rendered judgment and order on 22.02.1995. Therefore, there would be no occasion for the learned Advocate of the petitioners-opponents before the Tribunal to submit that as the suit is pending the matters may be remanded. It is not possible to divorce this part of the same sentence with what follows in the latter part of the same sentence. In the circumstances, it cannot be stated as to what extent the mind of the Tribunal stands vitiated by having taken into consideration an irrelevant fact which is factually contrary to the record and is not

germane to the facts of the present case.

12 In light of what is stated hereinbefore it becomes apparent that there was an apparent error on record which was required to be rectified by the Tribunal in the Review Applications which were preferred by the petitioners but the Tribunal has failed to consider the same, and therefore, even the subsequent order stands vitiated.

13 In the aforesaid set of facts and circumstances of the case, it is not necessary to enter into merits of the controversy between the parties. Orders dated 29.01.1999, 04.11.1999 and 18.04.2001 made by the Tribunal are hereby quashed and set aside and Appeal bearing Nos. 441 of 1995 and 349 of 1995 stand revived and restored to the file of the Tribunal for being decided afresh in accordance with law. The Court expects that the Tribunal shall record distinct and clear findings in relation to the condonation of delay and merits of the controversy between the parties. It is not necessary that the Tribunal should pass separate orders regarding condonation of delay and merits of the matters, but even while passing a consolidated order, the order must reflect that the decision as regards condonation of delay is prior in point of

time before entering to any discussion on merits of the controversy between the parties.

14 The petitions are allowed accordingly in the aforesaid terms. Rule made absolute. There shall be no order as to costs.

15 Needless to state that in the event the parties move an application for expeditious disposal of the appeals, considering the chequered history and the passage of time, the Tribunal shall give utmost priority in disposing of the appeals at the earliest. Registry to place copy of this judgment in cognate matter.

Sd/-
(D.A.Mehta, J.)

m.m.bhatt